

towards the end of the trial, were held by the District Judge not to have been proved. I fail to see that this is relevant to the charge, except to put the accused in a worse position. The more cash sales that were proved to have been effected by him, only made his position worse.

Also it is neither for the Court nor for the prosecution to intimate to the defence what witnesses or what evidence should be called for the defence.

(b) That the complainant had at no time asked the accused for his account books or that he wanted particulars of sales. The learned District Judge does not mention this point in his reasons for judgment. Neither does it appear in the evidence given. What does appear is that the accused definitely failed to keep promises made to the complainant to pay him amounts received in respect of the sales effected and then, when matters appear to be coming to a head, closes down his shop, disposes suddenly and secretly of practically his whole stock and disappears.

(c) I fail to understand this last ground as a reason for saying that the judgment was against the weight of evidence. It refers to the evidence given as to a proposed composition amongst the accused's creditors which, incidentally, was started after the warrant of arrest had been issued and whether the complainant knew or thought he had only a civil remedy against the accused is beside the point. The fact that he laid a criminal complaint immediately after accused's disappearance, hardly supports this suggestion.

What I have been concerned about more than anything else in this case is as to whether there is any possible ground for saying that the learned District Judge erred in drawing the inferences he undoubtedly did from the proved facts that the accused's failure to return the goods or pay for them was dishonest. Dishonesty is a necessary ingredient of the offences charged without proof of which a conviction cannot be obtained.

[55] Having regard to the accused's conduct on the 5th June and subsequent days, namely the interview with the complainant as to the [55] dishonoured cheque, the promise to pay for the "on consignment" goods that evening, his failure to keep either the appointment or his promise, the closing of the shop and surreptitious disposal somehow of the stock during the night and the subsequent flight and disappearance of the accused for several weeks during which time he contrived to for his creditors to be approached with a view to a composition being accepted, these are, in my opinion, ample grounds on which the learned District Judge might properly come to the conclusion he did, and convict the accused.

Neither in law, nor on the facts have any sufficient reasons been shewn for reversing his decision and quashing the conviction.

The appeal is therefore dismissed.

Appeal dismissed.

Solicitor: *E. M. Tampoe-Phillips.*

LIM YEW HOCK v. THE MUNICIPAL COMMISSIONERS OF THE TOWN AND FORT OF MALACCA

[O.C.J. (Burton Ag. C.J.) November 4, 1935]

[Malacca Suit No. 51 of 1935]

Ordinance No. 132 (Public Authorities Protection), s.2(1) — Action for mandamus.

An action for a *mandamus* (as distinguished from the prerogative writ of *mandamus*) comes within the word "action" in section 2(1) of Ordinance No. 132 and is subject to the restrictions imposed in respect of such actions by that Ordinance.

Semble, applications for the prerogative writs and actions founded in contract are not "actions, prosecutions or proceedings" within the language of section 2(1) of Ordinance No. 132 (Public Authorities Protection) and are excluded from the scope of that Ordinance.

TRIAL OF ACTION.

O'Connor for the defendants.

John Laycock for the plaintiff.

In this case the plaintiff brought an action against the Municipal Commissioners of the Town and Fort of Malacca for a *mandamus*. His claim in the statement of claim included claims for: (1) a declaration that a certain Municipal Building By-Law was unreasonable and *ultra vires* and void; (2) a *mandamus* ordering the defendants to consider and properly exercise their discretion on the question of the issue or non-issue to the plaintiff of a licence to manufacture and treat rubber at his factory. The defendants pleaded a defence on the merits and they also pleaded that the action was barred by Ordinance No. 132 (Public Authorities Protection) as no notice had been given in accordance with section 2(2)(a) of that Ordinance and also because the plaintiff had not pleaded that defendants had acted maliciously and without reasonable or probable cause. Thereupon the Court directed that the action should be transferred to Singapore for argument on the questions of law raised in connection with the Public Authorities Protection Ordinance. This preliminary point came on for hearing in Singapore on the 25th October, 1935 and the 28th October, 1935.

The suit is barred by Ordinance No. 132 (Public Authorities Protection). Sub-section (2)(a) and (b) and (3) of section 2 have not been complied with.

This is an "action" between a plaintiff and defendant commenced by writ of summons. It is commenced against a "person." The defendants are a "Public Authority." It is in respect of an act done in intended execution of a public duty or a neglect or default in the execution of a public duty and it falls within section 2(1) of Ordinance No. 132. The Public Authorities Protection Ordinance almost certainly does not apply to the prerogative writ of *mandamus*. [*Halsbury*, 2nd ed. vol. 9 p. 784 para. 1327 and note (e) p. 778 para. 1315 and note (g)].

In England the cases in deciding that the Public Authorities Protection does not apply to the prerogative writ are that such an application is not an "action,

prosecution or other proceeding against a person" also, in one case, that the prerogative writ is a right in the Crown which it would require clear words to impair, and that the words "action, prosecution or other proceeding against any person" are such clear words as to have that effect.

Rex v. Hertford Union, Ex parte Pollard, (1914) 111 L.T.R. 716; *Rex v. Port of London Authority, Ex parte Kynoch*, [1919] 1 K.B. 76; *Joliffe v. Wallasey Local Board*, 9 C.P. 62; *Roberts v. Metropolitan Borough of Battersea*, (1914) 110 L.T.R. 56.

None of these grounds would apply to an action for *mandamus* which is clearly an "action."

Even in an application for the prerogative writ, if other other relief be claimed, e.g. damages claimed in the reply to the return — so as to make the application an amalgamation of a *mandamus* with an action on the case, the Public Authorities Protection Act applies. *Rex v. Marshland Smeeth & Fen District Commissioners*, [1920] 1 K.B. 155.

In this action the plaintiff has joined a prayer for a declaration that the by-law is bad. That is substantial relief. It may be preliminary relief, as regards the plaintiff but, as regards the defendants, its results might go beyond the relief asked for by *mandamus*.

The Public Authorities Protection Act applies to an action for a *mandamus* and an injunction. *Merrick v. Liverpool Corporation*, (1920) 79 L.J. 9 Ch. 751. Also to actions for declarations of right or for a declaration that the acts of a public authority are illegal and *ultra vires* (*Halsbury*, 1st ed. vol. 23 p. 344 para. 697).

[56] [56] *Grand Junction Waterworks Co. v. Hampton U.D.C.*, (1899) 15 T.L.R. 412; *Attorney-General v. West Ham Corporation*, (1910) 26 T.L.R. 683; *Offin v. Rochford Rural Council*, [1906] 1 Ch. 342.

The Act applies to all actions, including *Chancery* suits and to applications for injunctions as well as damages. It applies to public bodies in respect of acts done or omitted in the exercise of statutory powers and duties. [*Harrop v. Mayor of Ossett*, [1898] 1 Ch. 525; *Fielding v. Morley Corporation*, [1899] 1 Ch. 1].

The plaintiff is out of time.

No sufficient notice was given. A notice only stating that plaintiff will consider taking action and not stating his intention to do so, and which is conditional, is bad. [*Mason v. Birkenhead Improvement Commissioners*, 29 L.J. Ex. 407; *Norris v. Smith*, 8 L.J. Q.B. 276].

As to section 2(3) of Ordinance No. 132, malice can be imputed to a corporation. No malice and want of reasonable or probable cause is alleged.

The language of section 2 of the Ordinance does not and cannot possibly mean what it says if the words are given their fullest possible construction. In ordinary language an application for a prerogative writ is certainly a proceeding but it has been held in England that it is not a proceeding within the meaning of the Public Authorities Protection Act which is in *pari materia* with the Ordinance. *Rex v. The London County Council, Ex parte Swan and Edgar*, 141 L.T.R. 590. In a similar manner it has been held that actions

A founded in contract are not within the Act. *Fletcher v. Greenwell*, 4 L.J. Ex. 126 and *Clarke v. Lewisham District Council*, 19 T.L.R. 62. In the latter case it was expressly argued that "action" meant "action of every kind" but it was held that this was not so. There are a number of *dicta* which suggest that the intention of the Ordinance is that it should apply to actions in tort and similar actions. *Rex v. The Port of London Authorities*, 4 L.J. Ex. 126 per *Banks L.J.*; *Naestead v. The State of Perak*, 5 F.M.S.L.R. 194; *Chief Secretary v. Soo Choon Wee*, 3 F.M.S.L.R. 126 at p. 174; *cf.* the language of sub-section 3. If malice and want of reasonable or probable cause is a necessary ingredient in the cause of action this supports the view that the intention of the section is that it should apply to claims in tort. In fact on the construction of the Ordinance itself the whole section is not intelligible and is self-destructive. Sub-section 3 requires that there shall be an allegation of malice. Sub-section 1 expressly contemplates an action in respect of an alleged neglect or default. Negligence and default negative malice and malice transcends negligence. So these two sections are to a certain extent definitely repugnant. Moreover in England it has been held in *Scammell v. Hurley*, [1929] 1 K.B. at p. 428 that if illegal acts done are really done from some improper motive or from malice the acts complained of are not done in "intended execution" of a public duty but only in "pretended execution" thereof and are not protected by the Act. This is equally applicable in the Colony. The action for *mandamus* as opposed to the prerogative writ of *mandamus* was introduced by the Common Law Procedure Act, 1854, section 68 which extended to the other Common Law Courts and to the Court of Chancery jurisdiction previously only exercised by the Court of Queen's Bench, but the writ of *mandamus* thereby authorised did not substantially differ from the previously existing prerogative writ (section 73). Any difference was of procedure only, not of substance. *Benson v. Paul*, (1856) 25 L.J. Q.B. 276. The Judicature Act (1873) merely transferred previous existing jurisdictions to the new High Court of Justice and the Rules of Court made thereafter referred to procedure. The action for *mandamus* is dealt with in the English Order 53 and our statutory provisions have step by step exactly followed the English statutory provisions and rules. So the effect of a *mandamus* obtained by action in this case is the same as the effect of a prerogative writ of *mandamus* and unless the form of proceeding is all important it should not be prohibited by the Ordinance. The claim for declaration was almost a necessary preliminary to obtaining a *mandamus*; it forms the ground for issue of a *mandamus*. In an application for a prerogative writ it is necessary to set out the ground in the application. This Ordinance is one that imposes a burden on a subject in that it deprives the subject of a right of action in certain cases and in others restrict such right. In cases of uncertainty such an Ordinance must be construed in a manner most favourable to the subject.

O'Connor in reply. The reason why actions founded in contract are not included within the protection afforded by the statute is that, upon a strict construction of the wording of the statute, these have

been held not to be "acts done in pursuance, etc. of a public duty" or "neglects or defaults in execution of a public duty."

Per contra where an enactment directly throws upon the authority a duty, and there is a breach of that duty, and the substance of the action is a wrongful act or neglect, even though there may also be a breach of an implied contract. [*Halsbury*, 2nd ed. p. 23 para. 693; *Lyles v. Southend-on-sea Corporation*, [1905] 2 K.B. 1]. The exception for contract does no violence to the language of the statute; but arises merely from a strict construction of its terms.

[57] [57] None of the reasons given in the cases for excluding the application for the prerogative writ of *mandamus* from the operation of the statute applies to a *mandamus* by action, except the *obiter dictum* of Bankes L.J. in *Rex v. The Port of London Authority*, (1919) 1 K.B. 176 to the effect that he thinks the Act seems to contemplate something which results, if successful, in payment of damages or in enforcing some penalty. This is not supported by later authorities.

Attorney-General v. West Ham Corporation, 26 T.L.R. 683; *Grand Junction Waterworks v. Hampton U.D.C.*, 15 T.L.R. 412.

The action is within the plain wording of the Ordinance.

The Ordinance, though difficult, can be construed. The wide general provisions of section 2(1) are curtailed by section 2(3). The result is that a plaintiff in the Colony has no remedy by action against a Public Authority for acts done or omissions, when the Public Authority has a *bona fide* intention to perform a statutory duty. Only malicious acts or neglect are actionable. That is recognised by the Privy Council in *Attorney-General for Straits Settlements v. Pang Ah Yew*, [1925] A.C. 559. That may be remarkable, but it is the plain meaning of the Ordinance.

Cur. Adv. Vult.

Burton Ag. C.J.: In this action the plaintiff asks for a *mandamus* against the Municipal Commissioners of Malacca, to compel them to exercise their discretion properly in the issue of a licence to the plaintiff's rubber factory. The defendants now take the preliminary objection that they are protected by Ordinance No. 132 (Public Authorities Protection). It is a plea in the nature of a demurrer, and for its determination we must assume the plaintiff's case that the Municipal Commissioners of Malacca have failed to exercise their discretion properly in the refusal of a licence to the plaintiff's rubber factory.

A plaintiff who claims a *mandamus* against a Public Authority has two methods of procedure open to him. He may apply by the common law remedy of a rule *nisi* for a prerogative writ of *mandamus*; or he may start an action under Order 50. The plaintiff has chosen the latter course, and with his prayer for a *mandamus*, he has joined a prayer for :

"A Declaration that the said Building Bye-Law, No. 17 . . . is unreasonable and *ultra vires* and void." It is common ground to the parties that if the plaintiff has chosen the common law remedy, the defendant would not have been able to invoke the protection of

A the Public Authorities Protection Ordinance. This principle was settled by the case of *Rex v. The London County Council, Ex parte Swan and Edgar Ltd.*, 141 L.T.R. 590 where Lord Hewart C.J. giving the judgment of the Court said, after referring to a number of cases :

B "No doubt the observations in these cases are in some degree of the nature of *obiter dicta*. But all the *dicta* point in one direction, and though there appear to be passages in text-books which indicate a contrary view, I am satisfied that the Public Authorities Protection Act, 1893 which provides by section 1 that an 'action, prosecution or other proceeding' against a public authority must be begun within six months after the act complained of, does not extend so as to include 'certiorari' in the word 'proceeding'."

C Mr. Laycock's argument is based on the proposition that if the common law remedy for a prerogative writ is not included in the word "proceeding," it may equally well be that the statutable action for *mandamus* is excluded from the word "action" in section 2 of the Ordinance. But the chief difficulty of this argument lies in the failure of the English cases to show the reason why an application for a prerogative writ is not within the meaning of the word 'proceeding.' The report in *Swan and Edgar's* case, *ubi sup.*, gives no hint of any reason; and it is difficult to infer any principle from the cases upon which that case is based, which may help us in deciding whether or not the word 'action' in section 2 should be similarly restricted so as to exclude an action for *mandamus*. In *Rex v. The Port of London Authority*, [1919] 1 K.B. 176 at p. 186 Bankes L.J. says, even using the actual word 'proceedings' in its forbidden sense :

D "As to the Public Authorities Protection Act, 1893, I express no confident opinion without further considering the *dicta* cited, but my present impression is that the language of that Act does not extend to proceedings of this class. The essence of the prerogative writ of *mandamus* is a command to a tribunal to do something which it has omitted or refused to do, and an application for the writ is not an action, prosecution or other proceeding for any act done in pursuance of execution or intended execution, nor, as I think, for any neglect or default in the execution of any Act of Parliament or public duty or authority. But apart from that the Act seems to contemplate something which results, if successful, in the payment of damages or in the enforcing of some penalty and the words 'action, prosecution or other proceeding' were not intended to include a prerogative writ calling upon a public authority to perform a public duty,"

F and Scrutton L.J. at p. 188:

G "The writ of *mandamus*, like that of *certiorari* and prohibition is a high prerogative writ, and a very valuable right in the Crown for keeping subordinate tribunals within their jurisdiction. Clear words [58] are necessary to impair such a right and the words of this Act 'action' (prosecution or other proceeding against any person) are no such clear words as to have that effect."

H Neither can I find any help in arriving at the principle in the other cases cited by Lord Hewart. The material part of section 2(1) of our Ordinance corresponds word for word with the first part of section 1 of the English Act; and it follows from these authorities (and this position is not contested), that an application for a rule *nisi* for a prerogative writ is not within the protection of the Ordinance.

I But we are now concerned with an "action," commenced by a writ. That this is an action is not in dispute; but the real question is whether an action started for a *mandamus* is within the Ordinance, while an application for a prerogative writ is admittedly out

[58]

of it. *Prima facie* there appears to be no logical ground why the right of the plaintiff should be affected by the procedure chosen; why he should be able to pursue a remedy by application for a rule *nisi* when he is precluded from taking out a writ. But the words of the statute are unrestricted in themselves. This is an action, and it is therefore apparently within the statute. In *Harrop v. The Mayor of Ossett*, [1896] 1 Ch. 525 Romer J. held that the word 'action' in the Public Authorities Protection Act includes all actions in the Chancery Division whether actions for an injunction or actions partly for an injunction and partly for damages. "In considering this Act," he said, "I see no sufficient reason for cutting down the generality of the word 'action' or limiting it in any way."

In bringing this action in the way he has done the plaintiff is acting in accordance with Order 50, which reproduces the English Order 53, which in its turn is based on the Common Law Procedure Act of 1854; and there seems to be no reason in this case, except the convenience of the parties, for choosing one form of procedure rather than the other. The procedure by action was chosen no doubt because there is a conflict of fact; and Mr. Laycock's case is that if the word "proceeding" has been limited by judicial interpretation so as not to include an application for a prerogative writ, the word "action" should be similarly limited to exclude an order for *mandamus*.

It is plain that "action" is not used to include every form of action. It excludes contract, for instance, see *Fletcher v. Greenwell*, 4 L.J. Ex. 126; and in *Clarke v. Lewisham District Council*, 19 T.L.R. 62 Bingham J. held against the argument that "action" in the Public Authorities Protection Act meant actions of every kind. "The authorities cited," he said, "and good sense, showed that it was not intended to apply to actions for damages for breach of contract."

But there is a stronger reason in this country for excluding actions for contract than in England, namely sub-section 3 of section 2, which is not in the English Act:

"In every action so brought it shall be expressly alleged that the defendant acted maliciously and without reasonable and probable cause; and if at the trial the plaintiff fails to prove such allegation judgment shall be given for the defendant."

This action is, as Mr. Laycock pointed out, quite inconsistent with any action for contract, and he referred to two *dicta* in the F.M.S.L.R. *Naesed v. The State of Perak*, 5 F.M.S.L.R. 194; and *Chief Secretary v. Soo Choon Wee*, 3 F.M.S.L.R. 126 at p. 174, which suggested that it was thought that similar provisions in the Federated Malay States only applied to tort. But these *dicta* are *obiter* and of very little weight, though Bankes L.J. has also used words which convey a very similar suggestion in the passage I have already quoted from his judgment in *Rex v. The Port of London Authority, ubi sup.* But whether this be so or not, (and there is authority to the contrary), it seems very difficult to apply sub-section 3 to an action "in respect of any alleged neglect or default in the execution of any such Ordinance, rules, duty or authority," if neglect means pure negligence, and default, as Scrutton L.J.

says it does, means a simple omission to do something which is required by statute to be done [*Scammel & Nephew Ltd. v. Hurley*, [1929] 1 K.B. 49 at p. 428]. It would seem to preclude altogether an action for negligently setting a building on fire. This actual difficulty does not fall to be decided in this present case, and it has only been mentioned as one of the many difficulties which I have had to consider in a difficult Ordinance; but it would seem that the only way to make sense of the wording is to say that the Ordinance provided that only a malicious neglect of a public duty is actionable.

The insertion of this sub-section, indeed, is the principal cause of our difficulties. In *Scammel's* case, *ubi sup.*, Scrutton L.J. at p. 427 says:

"To require the application of the Public Authorities Protection Act, the acts must be acts not authorised by any statute or legal jurisdiction, but acts intended to be done in pursuance or execution of some statute or legal power. It would appear therefore that if illegal acts are really done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority; if they are done from a desire to injure a person or to assist some person or cause without any honest belief that they are covered by statutory authority, or are necessary in the execution of statutory authority, the Public Authorities Protection Act is no defence, for the acts complained of are not in intended execution of a statute, but only in pretended execution thereof." [59]

This statement of the effect of the Statute is an interpretation of the first part of section 1, which is, as I have said, the model of our section 2(1), and Mr. Laycock boldly argues that therefore the insertion of sub-section 3 makes nonsense of our Ordinance. But it is my duty to interpret the Ordinance *ut res magis valeat quam pereat*; and it seems that the only possible conclusion consistent with this principle, is that these words of Scrutton L.J. although apt to the words he is interpreting, nevertheless can have no application to the same words in our Ordinance, and that in it the word 'intended' must be equivalent to 'pretended,' instead of, as in England, opposed to it. It seems to follow that while in England an action which alleges malice is not within the protection of the Act of 1893, nevertheless in this country the only action which can be brought at all against a Public Authority, is one which alleges malice and want of reasonable and probable cause; and that even such an action is subject to the restrictions imposed upon it by the Ordinance and one of the effects of this would seem to be that an action will lie against the Crown but not a Municipality for the negligence of its officers.

I have now to apply this reasoning as far as I can to the present case. I think that the Ordinance can be construed as it stands; but that it must be construed quite differently from the English Parent Act, and subject always to the dominance of sub-section 3. In the case of *Attorney-General of the Straits Settlements v. Pang Ah Yew*, [1925] A.C. 554 at p. 559 Lord Carson says:—

"It is further to be observed that under the Public Authorities Protection Ordinance (No. 132) no action lies against any person acting in execution of statutory duties unless the party complaining can allege malice and want of reasonable or proper cause. The result therefore would be that if the contention of the appellant succeeded, the subject would be in the absence of malice without any remedy."

But I do not think that we have here any reason to reject the English authorities which except applications for the prerogative writs and actions for contract from the Ordinance. *A fortiori* there is all the more reason to follow them, because actions for contract are never founded on malice; and it must be the rarest thing in the world for malice to be part of the case of an applicant for a prerogative writ; for otherwise the result would be in most cases that the subject would be without any remedy.

Am I therefore justified in holding that this exemption should be extended to the action for a *mandamus*? If it is not so extended the subject would not ordinarily be left without a remedy; for he could apply for a prerogative writ. But the right of action given by Order 50, though manifestly convenient where disputed facts have to be tried, if not excluded from the Ordinance, would be of very little value to the subject against a Public Authority, because of the necessity of alleging malice.

Although the right of action given by Order 50 may not be contemporaneous with the right to apply for a prerogative writ, it has not been disputed that both remedies may be taken in the present case. But I think it may be doubted if that position is correct. In *Smith v. The Chorley District Council*, [1897] 1 Q.B. 532 Kennedy J. held that an action for *mandamus* would not lie to compel a local authority to approve building plans; but that the proper remedy was an application for a prerogative writ of *mandamus*, and he quoted with approval a passage from the judgment of Day J. in *Baxter v. The London County Council*, 63 L.T. 767 at p. 771 which was quoted to me:

"The true and only remedy which the plaintiff has for the purpose of enforcing the rights which I am of opinion he has got, is by a prerogative writ of *mandamus*. When I objected that this was a matter for *mandamus*, I was answered that this was an action for *mandamus*. It was an action for a *mandamus* based upon the Common Law Procedure Act, 1854, and the action for a *mandamus* is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a *mandamus* or direct specific performance, or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a *mandamus* was to supersede the prerogative writ of *mandamus*. In this case no action will lie. I am perfectly clear that this is not an action which will lie between the parties, or a case in which statutable *mandamus* will be applicable, because no action would lie, and a *mandamus* is only granted as ancillary to the action, and for the purpose of enforcing the private right in respect of which the private litigation had arisen. It was never contemplated that a private *mandamus* should be granted in cases in which a prerogative *mandamus* had from time whereof memory does not run to the contrary been alone the effective remedy."

[60] Kennedy J. then goes on to say:

"I may say that so far as under the Common Law Procedure Act, 1854, there have been successful actions for a *mandamus* against public bodies; there appear to have been cases in which the relief by *mandamus* might properly be termed ancillary relief."

and he cites some cases in support.

Short and Mellor (The Practice of the Crown Office Ed. 2 p. 198) cite these two cases and others as authority for the proposition that the prerogative writ "differs from the statutory *mandamus* under Order

A 53 in that it is granted wherever there is a legal right to be enforced and no other specific and efficient remedy. Whereas the statutory *mandamus* can only be granted when the party has a right of action, and is in effect only granted as ancillary to the action and for the purpose of enforcing the private right in respect of which the private litigation has arisen."

B But if the statutory *mandamus* can only be used as ancillary to a right of action, Mr. Laycock finds himself in a dilemma. He has to argue that the prayer for a declaration is such a right of action as can carry the ancillary remedy of *mandamus*. But he has already been forced to argue that it is not so, and that it would make no difference to his action if it were struck out; because the joinder of the prayer for a *mandamus* with a prayer for other relief admittedly brings the writ within the protection of the Ordinance. *R. Marshland Smeeth and Fen District Commissioners*, [1920] 1 K.B. 155. I think that a prayer for a declaration is ordinarily such other relief (*Grand Junction Waterworks v. Hampton*, 15 T.L.R. 412) and it could be claimed under Ordinance 26 rule 5 without any consequential relief. If an action can be brought to test the validity of notices issued by the Commissioners of Inland Revenue under the Finance Act, 1910 (*Dyson v. The Attorney-General*, [1911] 1 K.B. 410) I can see no reason why the prayer for the declaration could not stand alone in this suit, although that would be discretionary with the trial Judge. I should not therefore be prepared to accede to the argument that the declaration is ancillary to the *mandamus*. It could I think with more force be argued that the *mandamus* in this action is ancillary to the declaration, because although the declaration in itself is undoubtedly a necessary step and the plaintiff cannot get a *mandamus* unless he shows that the bye-law is bad; nevertheless the declaration itself is made in the action may transcend the remedy; it may bring in its train consequences other and greater than the actual relief sought.

G The position therefore is that when a plaintiff brings an action for *mandamus* against a Public Authority or anyone else, the claim for *mandamus* must be ancillary to other relief; but the prayer for other relief to which the claim for *mandamus* is ancillary admittedly brings the Public Authority within the protection of the Ordinance. There is therefore no reason for any attempt on my part to whittle away further the plain meaning of the word "action" so as not to include an action for *mandamus* under Order 50. I think the word "action" must be held to cover an action under Order 50.

H Nor do I think that the plaintiff has brought himself within the Ordinance by giving the notice required by section 2(2)(c) which requires:

"One month's previous notice in writing of the intended action, and of the cause thereof."

I It is alleged that the letter of 23rd November, 1934 was such a notice. But this letter does not give notice of an intended action, but only of the possibility of an action. It says:

"In the event of a further refusal to grant same, my client will consider having the matter in question decided by the Supreme Court by way of *mandamus*."

and in the letter of 4th January, 1935 occur the words :

"Until further consideration my client is grateful for permission until 30th June next."

In *Norris v. Smith*, and *Mason v. Burkinhead*, similar conditional notices were held insufficient.

The preliminary objection therefore is good and the action must be dismissed with costs to be taxed under section 2(4) as between solicitor and client.

Action dismissed.

Solicitors: *Braddell Bros.; Drew & Napier.*

Re LEE KIM CHYE, deceased

[O.C.J. (Mills J.) November 22, 1935]

[Singapore Originating Motion No. 1 of 1935]

Ordinance No. 3 (Wills), s.13 — Revocation of will by marriage — Chinese secondary marriage.

If a Chinese marries a secondary wife after making his will such marriage revokes the will. When a ceremony is performed by Chinese on marrying a secondary wife such ceremony is strong evidence of intention to contract a permanent union. Recognition of the marriage by the husband's family is not an essential element of its validity.

Re Lee Choon Guan deceased, Lew Ah Lui v. Choa Eng Wan & Ors. [1935] M.L.J. 78, discussed.

ORIGINATING MOTION.

The plaintiff took out an originating motion for an order that the will of Lee Kim Chye, deceased had been revoked by his subsequent marriage with the plaintiff. The motion was served upon Chan Siew Choo, an executrix named in the will and issues were directed to be tried as to whether the applicant, Koh Gek Tiang (the plaintiff on the issues) was a lawful widow of [61] Lee Kim Chye, deceased and whether she became a lawful wife subsequent to the making of his will dated the 15th March, 1923, and whether the said will was thereby revoked. Chan Siew Choo was the defendant on the issues. The issues so directed to be tried came on for hearing on the 26th March, the 8th and 9th days of July, the 25th September and the 23rd October, 1935.

John Laycock for the plaintiff on the issues.

Ordinance No. 3 (Wills), sections 13 and 14. A will is revoked by subsequent marriage. This statutory provision was taken from English Wills Act but that Act was merely statutory recognition of old law. *Holdsworth's History of English Law*, Vol. 3, 1922 Edition, p. 540. *Williams on Executors*, 10th Edition, p. 138 and 11th Edition, p. 134. *Cook v. Oakley* (1715 A.D.) 24 English Reports at p. 400. *Blackstone's Commentaries*, 3rd Edition (1768), Vol. 2, p. 502. The principle that marriage or the birth of a new heir constitutes such a change in the circumstances of the testator that a will is thereby revoked is common to many systems of law. *Gaius' Institutes* (*Poste's* 4th Edition 1904, p. 199) and elsewhere. The matter has already been in effect decided in *Re Shaik Abubaker bin Mohamed Lajam deceased* [1935] M.L.J. 137. That was an Arab case but the principle is equally applicable in the Chinese case. Although the learned Chief Justice the Chinese case. Although the learned Chief Justice stated that this provision is one peculiar to English law, that is not correct, as his attention had not been

A drawn to similar provisions in Roman law and other systems of law. Evidence of a ceremony may not be conclusive but is strong evidence of the intention of parties to conclude a permanent union. A Chinese marriage will be inferred from cohabitation and repute. Family recognition is not an essential point though it is of course very good evidence of repute.

B *Koek* for the defendant on the issues.

A secondary marriage is a sacrament in the life of a Chinese though the means of creating this relationship are looser than in Christian country. The law of the Colony enables a secondary marriage to be effected either with or without ceremonies but if with ceremonies there are certain recognised forms, judicially defined and these must be followed. The repute must be a repute of some definite body of neighbours and must be repute of the status of wife. *Ma Wan Di v. Ma Kim* (35 Calcutta 232). Evidence of recognition may be necessary as setting the seal of respectability on the union. As to revocation the Court will construe section 13 of the Wills Ordinance reasonably and workably. This section applies to a marriage which can be proved to have taken place at a certain date. Any other construction would be unworkable. When a marriage depends upon long continued co-habitation it is impossible to say whether such marriage took place before or after the date of the will. In *Shaik Abubaker bin Mohamed Lajam, deceased's* case the marriage took place on a certain date.

E *Laycock* in reply.

I repeat my argument in the *Lee Pang Seng's* case. Recognition by the husband's family is strong evidence of repute but is no more. There have been cases where the husband refused to admit the marriage or where the family has refused recognition. *Woon Kai Chiang v. Yeo Pak Yee & ors.*, [1926] S.S.L.R., C.A., pp. 41 and 42 *per* Brown J. approved by Macabe Reay J., *Cheang Thye Phin v. Tan Ah Loy & ors.*, 14 S.S.L.R., C.A., p. 85; *Goodman v. Goodman*, 28 L.J. Ch. p. 745; *Collins v. Bishop*, 48 L.J. Ch. p. 31; *Lyle v. Ellwood*, L.R. 19 Eq. at p. 106; *Elliot v. Totnes Union*, 9 T.L.R. p. 468; *In re Haynes*, 94 T.L.R. p. 441. Repute does not need to be repute in the family and can be divided repute. Contrary statements by the husband are no more than evidence. Irregularity in the ceremony is of no importance. *Eversley's Law of Domestic Relations*, 4th Ed., pp. 5 and 6. *Halsbury (Hailsham)*, Vol. 16, p. 598 and cases there cited. It has been clearly laid down in England that in the case of a marriage presumed from cohabitation and repute "you must infer the consent as having been given at the first moment when you find the parties able to enter into the contract." *Campbell v. Campbell*, L.R. 1 Sc. App. at p. 213. *Re Haynes, supra.*

Cur. Adv. Vult.

I Mills J.: The issues to be tried are —

- (1) Whether Koh Gek Tiang is a lawful widow of Lee Kim Chye, deceased.
- (2) Whether Koh Gek Tiang was the lawful wife of the said Lee Kim Chye subsequent to the making of his will dated the 15th day of March, 1923.
- (3) Whether the said will dated the 15th day of March, 1923, was thereby revoked.